NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
JUN 26 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL RANDLE RAVELICH, Appellant.	)	2 CA-CR 2007-0224 2 CA-CR 2007-0235 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20033234 and CR-20033892

Honorable Paul E. Tang, Judge
Honorable John E. Davis, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In these consolidated appeals, defendant/appellant Michael Randle Ravelich appeals from his convictions and sentences on three counts of aggravated driving under the influence of an intoxicant (DUI), possession of marijuana, and possession of drug paraphernalia. He argues the trial court erred in denying his motion to suppress evidence in CR-20033234 and improperly instructing the jury in CR-20033892 on the actual-physical-control element of aggravated DUI. Finding no error, we affirm.

Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). At trial in CR-20033234, Pima County Sheriff's Deputy Barton Davis testified he had stopped Ravelich's vehicle for speeding in May 2003. When Davis approached Ravelich's car, he smelled an odor of burnt marijuana coming from it. On initial questioning, Ravelich admitted having "had a few" drinks at his mother's house. After observing that Ravelich exhibited several indicia of intoxication, Davis asked if he would voluntarily submit to field sobriety tests. Ravelich agreed and performed poorly on them.

¶3 Davis ultimately arrested Ravelich for DUI. As he was being handcuffed, Ravelich voluntarily said he was "totally guilty of drinking and driving." Davis also testified that, after Ravelich had been read and waived his *Miranda*[1] rights, he admitted that he

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

owned a film canister containing marijuana and a pipe found inside his car. A blood test showed that Ravelich had an alcohol concentration of .187. After a jury trial held in his absence, Ravelich was convicted in CR-20033234 of two counts of aggravated DUI, possession of marijuana, and possession of drug paraphernalia.

¶4 In CR-20033892, in September 2003, an off-duty police officer saw a car parked but still idling in a post office parking lot. Ravelich was hunched over in the driver's seat of the car and not moving. When the officer could not wake Ravelich, he called 911. An ambulance and a sheriff's deputy responded. Ravelich eventually awoke and spoke to a paramedic, explaining he had been drinking and wanted "to chill." The sheriff's deputy noticed that Ravelich swayed when he stood; had red, watery, and bloodshot eyes; and smelled of alcohol. After Ravelich refused to perform field sobriety tests, the deputy arrested him. Testing showed that Ravelich had a .218 blood alcohol concentration. Following another jury trial held in his absence, Ravelich was convicted of aggravated DUI.

Discussion

I. Motion to suppress in CR-20033234

¶5 Ravelich first argues the trial court erred in denying his motion in CR-20033234 to suppress evidence of the film canister containing marijuana that Deputy Davis had seized and testified about at trial.[2] Ravelich challenges the court's ruling that the

[2]The record reflects that the "film canister and marijuana" also were admitted as an exhibit at trial, apparently without objection.

canister and its contents were "the byproduct of a search incident to arrest" and, therefore, admissible.[3] Generally, "[w]e review a trial court's decision on a motion to suppress evidence for an abuse of discretion" and view the evidence in the light most favorable to upholding the trial court's ruling, considering only the evidence presented at the suppression hearing. *See State v. Bentlage*, 192 Ariz. 117, ¶ 2, 961 P.2d 1065, 1066 (App. 1998); *see also State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996).

¶6 As the state points out, however, Ravelich did not move below to suppress any evidence relating to the canister and its marijuana contents, only the results of the field sobriety tests and certain pretrial statements he had made. Thus, we review the new issue he raises only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Rojers*, 216 Ariz. 555, ¶ 13, 169 P.3d 651, 654 (App. 2007) (argument not raised in suppression motion or at suppression hearing forfeited absent fundamental error). "To obtain relief under the fundamental error standard of review, [the defendant] must first prove error." *Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

¶7 At the suppression hearing, Davis testified that, before reading the *Miranda* rights to Ravelich, Davis had asked him "what [Davis] was going to find in the film canister

[3]Ravelich states in the heading to his argument on this point that the evidence should have been suppressed as "the fruit of the poisonous tree"—an "inadmissible statement" made in response to a question by Davis before he gave Ravelich the *Miranda* warnings. But he does not develop or cite any authority for that argument, so we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

that was next to [Ravelich's] feet and between the center console." Ravelich responded that Davis would "probably . . . find a little bit of weed in there." No further testimony was elicited at the suppression hearing about a search or seizure of the canister and the marijuana it contained, nor did Ravelich argue for suppression of those items or evidence relating to them. As noted above, at trial Davis testified about the contraband without objection. Ravelich now contends that evidence should have been suppressed.

¶8 "The Fourth Amendment guarantees the right of citizens to be free from unreasonable governmental searches." *State v. Gant*, 216 Ariz. 1, ¶ 8, 162 P.3d 640, 642 (2007); *see also* U.S. Const. amend. IV. "'[S]ubject only to a few specifically established and well-delineated exceptions,' a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant." *Gant*, 216 Ariz. 1, ¶ 8, 162 P.3d at 642, *quoting Katz v. United States*, 389 U.S. 347, 357 (1967). A search incident to a valid arrest is one such exception. *Id.* ¶ 9. When a suspect is arrested in an automobile, in appropriate circumstances the scope of the permissible search extends to the passenger compartment as well as to containers found within it. *See id.* ¶¶ 10-11, 23. Ravelich does not argue that his arrest was invalid. *See State v. Superior Court*, 149 Ariz. 269, 276, 718 P.2d 171, 178 (1986) (defendant's driving, fair performance on field sobriety tests, smell of alcohol on breath, and appearance established probable cause to arrest for DUI).

¶9 Searches incident to arrest "have long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." *New York v. Belton*, 453 U.S. 454, 457 (1981), *quoting Chimel v. California*, 395 U.S. 752, 763 (1969). Relying on our supreme court's decision in *Gant*, however, Ravelich maintains the exception for searches incident to arrest did not apply in his case because he "[wa]s secured and thus present[ed] no reasonable risk to [Davis's] safety or the preservation of evidence." *Gant*, 216 Ariz. 1, ¶ 23, 162 P.3d at 646. But *Gant* addressed "whether the police may conduct a search incident to arrest at all once the scene is secure." *Id*. ¶ 12. In that case, "Gant was handcuffed, seated in the back of a locked patrol car, and under the supervision of a police officer"; no unsecured civilians were in the vicinity; and "[a]t least four officers were on the scene." *Id*. ¶ 13.

¶10 The record here does not suggest the scene was similarly secure when Davis seized the film canister after Ravelich said it contained marijuana. Davis was alone on the side of the road when he arrested Ravelich. The record does not show whether any other civilians were in the vicinity at the time. And, although the record does not reflect when the canister was actually searched or seized, Davis noticed it in the car and asked Ravelich about it during "the arrest procedure," not after Ravelich was restrained or in Davis's patrol car. On this limited record, we cannot say that the circumstances here resembled those presented in *Gant* or that *Gant* otherwise required suppression of the canister and marijuana. Nor can

we say that the state failed to meet its "burden of proving the lawfulness of the acquisition of the challenged evidence," particularly when Ravelich's motion did not address that specific evidence. *Rodriguez v. Arellano*, 194 Ariz. 211, 215, 979 P.2d 539, 543 (App. 1999). We conclude that Davis's search and seizure were authorized under the warrant-requirement exception for a vehicle-related search incident to an arrest. Therefore, we agree with the state that the trial court did not err, fundamentally or otherwise, in "failing *sua sponte* to suppress the challenged items."

II. Actual physical control instruction in CR-20033892

¶11 Ravelich also contends the trial court erred by improperly instructing the jury in CR-20033892 on the actual physical control requirement for DUI under A.R.S. § 28-1381(A). He argues the court should have given his requested instruction that set forth various "factors" the jury could consider in determining whether he had been in actual physical control of his vehicle when he was arrested. "We review *de novo* whether a jury instruction properly stated the law." *State v. Cox*, 201 Ariz. 464, ¶ 8, 37 P.3d 437, 440 (App. 2002).

¶12 During the settling of jury instructions below, Ravelich proposed an instruction on actual physical control that included what he claimed were several pertinent factors bearing on that issue and another instruction stating, "There is a policy in Arizona that encourages the impaired driver to pull off the roadway." Over his objection, the trial court ultimately did not use those portions of Ravelich's proffered instructions. Instead, it

instructed the jury, "The defendant was in actual physical control of the vehicle if, based on the totality of the circumstances show[n] by the evidence, his potential use of the vehicle presented a real danger to himself or others."

¶13 As this court has previously noted, the phrase actual physical control "is not defined in Arizona's DUI statutes." *State v. Dawley*, 201 Ariz. 285, ¶ 3, 34 P.3d 394, 396 (App. 2001). And our supreme court has abandoned the "bright line test" employed in earlier case law in favor of a "'totality' approach [that] recognizes that each situation may be different and requires the fact finder to weigh the myriad of circumstances in fairly assessing whether a driver relinquished control and no longer presented a danger to himself or others." *State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629 (1995). In keeping with that approach, this court ruled in *Dawley* that the jury on remand in that case "should be instructed that [the defendant] was in 'actual physical control' of the vehicle if, based on the totality of the circumstances shown by the evidence, his potential use of the vehicle presented a real danger to himself or others." *Dawley*, 201 Ariz. 285, ¶ 9, 34 P.3d at 397-98. That is precisely the instruction the trial court gave in this case, and it accurately states the law.

¶14 Furthermore, as the state points out, the supreme court in *Love* did not require trial courts to provide juries with a list of factors they might consider in determining whether a driver was in actual physical control, and Ravelich cites no other authority for such a proposition. *See State v. Brooks*, 127 Ariz. 130, 138, 618 P.2d 624, 632 (App. 1980)

("A.R.S. § 13-3988(B) does not require that an instruction be given to the jury incorporating all the listed factors to be considered by the trial judge" in determining voluntariness of confession); *cf. Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, ¶ 12, 46 P.3d 431, 434 (App. 2002) ("[A] trial court is not required to instruct the jury on every nuance of law suggested by counsel."). Indeed, such a list of factors, even if given to the jury as illustrative and not exhaustive, might easily result in the type of "rigid, mechanistic analysis" with which the *Love* court was concerned. 182 Ariz. at 326, 897 P.2d at 628. We cannot say, therefore, that the trial court erred in refusing to include such a list in the instruction it gave.

¶15 Ravelich also argues, as we recognized in *Dawley*, that "our supreme court has discouraged extracting jury instructions directly from the language of appellate decisions." *Dawley*, 201 Ariz. 285, ¶ 6, 34 P.3d at 397. That is so, however, because language plucked from decisions can often result in instructions that are "'confusing to those not trained in the law,'" not because the resulting instructions misstate the law. *Id.*, *quoting State v. Martinez*, 175 Ariz. 114, 120, 854 P.2d 147, 153 (App. 1993). Thus, a jury instruction using language from an appellate decision does not necessarily result in error as long as it correctly states the law, as did the instruction here.

¶16 As he did below, Ravelich also contends the trial court was required to instruct the jury on "the public policy enunciated by the Arizona Supreme Court in *Love* and [*State v.*] *Zavala*, [136 Ariz. 356, 359, 666 P.2d 456, 459 (1983)], . . . that . . . seeks to encourage the impaired driver to pull off the roadway." As the state acknowledges, such a public

policy exists, but none of the cases on which Ravelich relies requires a trial court to include it in a jury instruction. *See Love*, 182 Ariz. at 324, 897 P.2d at 626; *Zavala*, 136 Ariz. at 356, 666 P.2d at 456. As the state points out, Ravelich's counsel informed the jury about this public policy during closing argument, and "[c]losing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989). In sum, we cannot say the trial court erred in instructing the jury on actual physical control.

Disposition

¶17 Ravelich's convictions and sentences in both consolidated cases are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge